U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
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Washington, DC 20529-2090

Identifying data deleted to prevent clearly unwarranted invasion of personal privacy

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U.S. Citizenship and Immigration Services

[redacted]

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DATE: APR 19 2012 OFFICE: TEXAS SERVICE CENTER [redacted]

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the law was inappropriately applied by us in reaching our decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen. The specific requirements for filing such a request can be found at 8 C.F.R. § 103.5. All motions must be submitted to the office that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of $630. Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires that any motion must be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center, denied the employment-based immigrant visa petition. The Administrative Appeals Office (AAO) dismissed the petitioner's appeal. The matter is now before the AAO on a motion to reconsider. The AAO will dismiss the motion.

The petitioner seeks classification under section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), as an alien of exceptional ability in the arts, the sciences or business. The petitioner seeks employment as a "physician of rehabilitative medicine." The petitioner asserts that an exemption from the requirement of a job offer, and thus of a labor certification, is in the national interest of the United States.

The petitioner filed the Form I-140 petition on August 3, 2006. The director denied the petition on May 6, 2009, stating that the petitioner had not established that he qualifies as a member of the professions holding an advanced degree, or that an exemption from the requirement of a job offer would be in the national interest of the United States. The petitioner appealed the decision to the AAO on June 8, 2009. The AAO dismissed the appeal on December 1, 2010, affirming the director's findings and also concluding that the petitioner does not qualify for classification as an alien of exceptional ability in the arts, the sciences or business. The petitioner filed a timely motion to reconsider on January 3, 2011.

A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or Service policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4).

The U.S. Citizenship and Immigration Services (USCIS) regulation at 8 C.F.R. § 103.5(a)(1)(iii)(C) requires that a motion must include a statement about whether or not the validity of the unfavorable decision has been or is the subject of any judicial proceeding and, if so, the court, nature, date, and status or result of the proceeding. The motion does not include this required statement. Despite this procedural flaw, the AAO will consider the merits of the petitioner's motion.

Section 203(b) of the Act states, in pertinent part:

> (2) Aliens Who Are Members of the Professions Holding Advanced Degrees or Aliens of Exceptional Ability. –
>
> > (A) In General. – Visas shall be made available . . . to qualified immigrants who are members of the professions holding advanced degrees or their equivalent or who because of their exceptional ability in the sciences, arts, or business, will substantially benefit prospectively the national economy, cultural or educational interests, or welfare of the United States, and whose services in the sciences, arts, professions, or business are sought by an employer in the United States.
> >
> > (B) Waiver of Job Offer –

> (i) . . . the Attorney General may, when the Attorney General deems it to be in the national interest, waive the requirements of subparagraph (A) that an alien's services in the sciences, arts, professions, or business be sought by an employer in the United States.

The first question for which the petitioner seeks reconsideration is whether the petitioner qualifies as a member of the professions holding an advanced degree.

The USCIS regulation at 8 C.F.R. § 204.5(k)(2) includes the following relevant definitions:

> *Advanced degree* means any United States academic or professional degree or a foreign equivalent degree above that of baccalaureate. A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree.
>
> *Profession* means one of the occupations listed in section 101(a)(32) of the Act, as well as any occupation for which a United States baccalaureate degree or its foreign equivalent is the minimum requirement for entry into the occupation.

Section 101(a)(32) of the Act, mentioned in the regulation, reads: "The term 'profession' shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries."

The AAO, in its dismissal notice, found that the petitioner had not shown that his occupation qualifies as a profession. The AAO also noted "the petitioner has never claimed to be a member of the professions holding an advanced degree," but addressed the issue because the director had done so in the denial decision. The AAO cited the Department of Labor's *Occupational Outlook Handbook* to show that "a baccalaureate or foreign equivalent is not required for employment as a massage therapist," and noted that the petitioner had not documented at least five years of progressive post-baccalaureate experience as of the petition's filing date.

On motion, the petitioner states:

> [T]he court held that acupuncturist was a specialty occupation encompassing the definition of professional. Cutler v. Ilchert, (N.D. Cal. 1985). Furthermore, in Young China Daily v. Chappell, the court addressed that "position can be considered professional based on the complexity of the duties alone.["] Young China Daily v. Chappell, 742 F. Supp. 552 (N.D. Cal. 1989). Moreover, the court further addressed that "INS should give deference to the employer's view, should consider fully the employer's evidence and not rely simply on standardized government classification

> systems.["] Unico American Corp. v. Watson, Case No. CV 89-6958 (C.D. Cal. Mar. 19, 1991).

All of the cited cases are district court cases. In contrast to the broad precedential authority of the case law of a United States circuit court, the AAO is not bound to follow the published decision of a United States district court in matters arising within the same district. *See Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). Although the AAO will give due consideration to the reasoning underlying a district judge's decision, the AAO does not have to follow the analysis as a matter of law. *Id.* at 719.

One of the cited cases, *Cutler v. Ilchert*, is an unpublished decision of a federal district court in California. The petitioner, on motion, has not provided a copy of the court's decision. Therefore, the petitioner has not shown that his summary of the court's decision is complete or accurate. Going on record without supporting documentary evidence is not sufficient for purposes of meeting the burden of proof in these proceedings. *Matter of Soffici*, 22 I&N Dec. 158, 165 (Comm'r 1998) (citing *Matter of Treasure Craft of California*, 14 I&N Dec. 190 (Reg'l Comm'r 1972)).

The petitioner's use of quotation marks implies that the petitioner is quoting from the other two cited cases, but the phrases so marked do not appear in those cases. The statement "[the] position can be considered professional based on the complexity of the duties alone" does not appear in *Young China Daily v. Chappell*. That decision addresses the issue of "complexity" in only one paragraph, which reads:

> Defendants have argued that there is no evidence that the particular duties of the job offered "are sufficiently complex in nature to require more than merely an individual with some design experience." (Defs.' brief at 10) Defendants apparently believe that the complexities of design duties are determined by the size of an employer, rather than the nature of graphic design work, i.e. the larger the employer, the more complex the work. The Court finds that it is the duties themselves rather than the size of the employer which is relevant. The statute itself enumerates several examples of professions without any qualifying distinctions based on size of operation, 8 U.S.C. 1101(a)(32), and some of these professionals clearly provide valuable professional services to society working for small volume operations at what might be considered lower end salaries.

Id. at 554-55. Elsewhere in the same decision, the court based its conclusion in part on the finding that "Plaintiffs submitted voluminous evidence which demonstrated that . . . a Bachelor of Fine Arts Degree is a minimum prerequisite to enter the graphic design field." *Id.* at 555. The court also acknowledged and approved of the AAO's reliance of Department of Labor reference publications, in this instance the *Dictionary of Occupational Titles. Id.*

The sentence "INS should give deference to the employer's view, should consider fully the employer's evidence and not rely simply on standardized government classification systems" does

not appear in *Unico American Corp. v. Watson.* The court did not publish that decision, but a copy of the decision is available on the WestLaw database. In that decision, the court stated:

> There is a serious question about the appropriateness of second guessing the business judgement of a successful company by telling it, although it requires a bachelor degree and 3 years experience in certain data processing position, these requirements are inappropriate compares [*sic*] to standardized government classification system.

Id. The court did not base this decision on a finding that the Immigration and Naturalization Service (INS, now USCIS) could not rely on a "standardized government classification system." Rather, the court found that the INS had mischaracterized the alien's occupation by looking at the job title without duly considering the stated duties of the position. In the court's words: "INS . . . applies [a] rigid standard with no consideration of the individual's business requirements of a petitioner." *Id.* This is consistent with the petitioner's assertion that the director must consider "the employer's view," but in this instance there is no employer to select or reject job candidates based on how their abilities match the employer's needs. Rather, the petitioner has stated his intention to "establish an institute of rehabilitative medicine." There is no realistic possibility that the petitioner would find himself unqualified for employment, or seek a better-qualified replacement for himself. The petitioner cannot define himself into a profession simply by tailoring his own "business requirements" to the regulatory standards.

> It is well settled that the regulations which the Service [now USCIS] promulgates have the force and effect of law and are binding on the Service. Bridges v. Wixon, 326 U.S. 135, 153 (1945); Bilokumsky v. Tod, 263 U.S. 149, 155 (1923); Matter of A-, 3 I&N Dec. 714 (BIA 1949); cf. Vitarelli v. Seaton, 359 U.S. 535 (1959); Service v. Dulles, 354 U.S. 363 (1957); United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954); Matter of Santos, 19 I&N Dec. 105 (BIA 1984); Matter of Garcia-Flores, 17 I&N Dec. 325 (BIA 1980).

Matter of L-, 20 I&N Dec. 553, 556 (BIA 1992). The regulatory definition of a "profession" is binding on USCIS employees in their administration of the Act, and neither the director nor the AAO has discretion to disregard it. *See, e.g., Panhandle Eastern Pipe Line Co. v. Federal Energy Regulatory Commission,* 613 F.2d 1120 (C.A.D.C., 1979) (an agency is bound by its own regulations); *Reuters Ltd. v. F.C.C.*, 781 F.2d 946, (C.A.D.C.,1986) (an agency must adhere to its own rules and regulations; *ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned). The current regulatory definition of a profession dates from late 1991, after the issuance of the above decisions. 56 Fed. Reg. 60905 (Nov. 29, 1991). District court decisions that predate that definition do not nullify or modify that definition, or permit or require USCIS to disregard the definition.

Furthermore, as the AAO and the director observed, the petitioner is not strictly an acupuncturist as such. He identifies himself as a "physician of rehabilitative medicine" who uses acupuncture as one of several tools. (The AAO also noted that, after filing the petition, the petitioner submitted

evidence showing that he works as a massage therapist.) The petitioner bears the burden of showing that his intended occupation, as he described it, meets the regulatory definition of a profession. The petitioner has not shown what would prevent an individual without a baccalaureate degree from establishing a practice as a "physician of rehabilitative medicine," or "an institute of rehabilitative medicine." Notwithstanding the petitioner's use of the term "physician," there is no evidence that the petitioner is in fact a physician.

The AAO notes that, on motion, the petitioner submits a copy of his registration as an acupuncturist with the State of New Jersey. The registration was valid from May 4, 2010 to June 30, 2011, long after the petition's 2006 filing date. The petitioner had not previously claimed New Jersey registration. Documentation from 2010 cannot retroactively establish the petitioner's eligibility as of the petition's filing date or show that the AAO's decision was incorrect at the time of that decision. *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l Comm'r 1971).

For the reasons explained above, the petitioner has not shown that the AAO was incorrect in its finding that the petitioner had not shown his intended occupation to be a profession.

ADVANCED DEGREE

The next question is whether the petitioner holds an advanced degree. This question relates to, but is separate from, the question of whether the petitioner's occupation is a profession. The USCIS regulation at 8 C.F.R. § 204.5(k)(3)(i) states that, to show that the alien is a professional holding an advanced degree, the petitioner must submit:

> (A) An official academic record showing that the alien has an United States advanced degree or a foreign equivalent degree; or
>
> (B) An official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree, and evidence in the form of letters from current or former employer(s) showing that the alien has at least five years of progressive post-baccalaureate experience in the specialty.

The director found that the petitioner had not shown that he holds an advanced degree or its equivalent. The AAO agreed with that finding, stating:

> [T]he petitioner submitted evidence that he enrolled in a Master of Science program in Health Science and Acupuncture at the New York College of Traditional Chinese Medicine. The petitioner enrolled in this program in January 2007, after the filing date of the petition. Thus, this evidence cannot be considered. *See* 8 C.F.R. §§ 103.2(b)(1), (12); *Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg'l. Comm'r. 1971).

On motion, the petitioner states: "Contrary to the AAO conclusion, the Petitioner obtained the Master of Science in Health Science and Acupuncture." The motion includes no evidence to establish when, if at all, the petitioner earned his newly claimed master's degree.

Under the USCIS regulation at 8 C.F.R. § 103.5(a)(3), a motion to reconsider must establish that the decision was incorrect based on the evidence of record at the time of the initial decision. The petitioner, on motion, does not show – or even specifically claim – that he held a master's degree as of the petition's August 2006 filing date, or that he had previously submitted evidence of that degree. Therefore, the petitioner has not shown that the AAO's decision was incorrect based on the evidence of record at the time of that decision.

EXCEPTIONAL ABILITY

The third question on motion is whether the petitioner qualifies as an alien of exceptional ability. *Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. 8 C.F.R. § 204.5(k)(2). The regulation at 8 C.F.R. § 204.5(k)(3)(ii) states that, to show that the alien is an alien of exceptional ability in the sciences, arts, or business, the petition must be accompanied by at least three of the following:

> (A) An official academic record showing that the alien has a degree, diploma, certificate, or similar award from a college, university, school, or other institution of learning relating to the area of exceptional ability;
>
> (B) Evidence in the form of letter(s) from current or former employer(s) showing that the alien has at least ten years of full-time experience in the occupation for which he or she is being sought;
>
> (C) A license to practice the profession or certification for a particular profession or occupation;
>
> (D) Evidence that the alien has commanded a salary, or other remuneration for services, which demonstrates exceptional ability;
>
> (E) Evidence of membership in professional associations; or
>
> (F) Evidence of recognition for achievements and significant contributions to the industry or field by peers, governmental entities, or professional or business organizations.

The AAO found that the petitioner's evidence met the plain language of only two of the six standards, specifically 8 C.F.R. §§ 204.5(k)(3)(ii)(A) and (C), regarding education and certification respectively. In a subsequent final merits determination, the AAO found that the petitioner had not shown his educational credentials to represent a degree of expertise significantly above that

ordinarily encountered in his occupation. The AAO noted the petitioner's memberships in associations, but found that the petitioner had not shown the associations to qualify as "professional associations" because the petitioner had not established that the underlying occupations meet the regulatory definition of a "profession." The AAO added:

> Even if we were to consider the petitioner's memberships as qualifying under 8 C.F.R. § 204.5(k)(3)(ii)(E), the record contains no information about the associations of which the petitioner is a member such that we can determine whether these memberships are indicative of or consistent with a degree of expertise significantly above that ordinarily encountered."

On motion, the petitioner asserts that "the AAO failed to properly apply the definition of profession." As noted previously, the petitioner does not show that the occupations in question meet that definition. The petitioner cites no case law relevant to the current definition.

The petitioner also states: "the statutory [*sic*] language clearly states "professional or business organizations." *See* 8 C.F.R. § 204.5(k)(3)(ii). The statutory language does not require the *significance* or *reputation* of any organizations." In this passage, the petitioner quoted regulatory (not statutory) language from 8 C.F.R. § 204.5(k)(3)(ii)(F). The AAO, however, was discussing a different regulatory clause at 8 C.F.R. § 204.5(k)(3)(ii)(E), which concerns "membership in professional associations."

With respect to the significance and reputation of such organizations, the AAO explained "*Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010), sets forth a two-part approach where the evidence is first counted and then considered in the context of a final merits determination." Thus, if the petitioner's evidence meets the plain language of a regulation, the discussion then moves to a final merits determination to compare that evidence to the overall intent of the immigrant classification sought. In this instance, the USCIS regulation at 8 C.F.R. § 204.5(k)(2) states: "*Exceptional ability in the sciences, arts, or business* means a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business." Therefore, the petitioner's evidence cannot establish exceptional ability unless it establishes a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. Membership in associations does not automatically or self-evidently establish expertise. An association might, for instance, accept every worker who possesses the minimum qualifications to engage in a particular occupation, or every applicant who is able to pay membership dues.

The AAO explained that, using the final merits determination mandated by *Kazarian*, the AAO must consider not only whether the petitioner is a member of professional associations, but also whether those memberships demonstrate a degree of expertise significantly above that ordinarily encountered in the sciences, arts, or business. The petitioner cannot define himself into eligibility simply by joining associations that have no particular membership standards.

For the reasons discussed above, the petitioner has not shown that the AAO's decision regarding exceptional ability was incorrect based on the record at the time of the decision.

NATIONAL INTEREST WAIVER

The fourth and final question is whether it is in the national interest to exempt the petitioner from the statutory job offer requirement that normally applies to the classification he has chosen to seek.

Neither the statute nor the pertinent regulations define the term "national interest." Additionally, Congress did not provide a specific definition of "in the national interest." The Committee on the Judiciary merely noted in its report to the Senate that the committee had "focused on national interest by increasing the number and proportion of visas for immigrants who would benefit the United States economically and otherwise. . . ." S. Rep. No. 55, 101st Cong., 1st Sess., 11 (1989).

Supplementary information to regulations implementing the Immigration Act of 1990, published at 56 Fed. Reg. 60897, 60900 (November 29, 1991), states:

> The Service [now USCIS] believes it appropriate to leave the application of this test as flexible as possible, although clearly an alien seeking to meet the [national interest] standard must make a showing significantly above that necessary to prove the "prospective national benefit" [required of aliens seeking to qualify as "exceptional."] The burden will rest with the alien to establish that exemption from, or waiver of, the job offer will be in the national interest. Each case is to be judged on its own merits.

Matter of New York State Dept. of Transportation (*NYSDOT*), 22 I&N Dec. 215 (Act. Assoc. Comm'r 1998), has set forth several factors which must be considered when evaluating a request for a national interest waiver. First, the petitioner must show that the alien seeks employment in an area of substantial intrinsic merit. Next, the petitioner must show that the proposed benefit will be national in scope. Finally, the petitioner seeking the waiver must establish that the alien will serve the national interest to a substantially greater degree than would an available United States worker having the same minimum qualifications.

While the national interest waiver hinges on prospective national benefit, the petitioner must establish that the alien's past record justifies projections of future benefit to the national interest. The petitioner's subjective assurance that the alien will, in the future, serve the national interest cannot suffice to establish prospective national benefit. The intention behind the term "prospective" is to require future contributions by the alien, rather than to facilitate the entry of an alien with no demonstrable prior achievements, and whose benefit to the national interest would thus be entirely speculative.

The AAO, in its dismissal notice, stated:

> [I]n order for the petitioner to demonstrate that he works in an area of substantial intrinsic merit, he must demonstrate that his particular area of treatment is widely accepted as beneficial or at least promising. The petitioner relies on anecdotal

> affirmations from his patients, employers and members of the medical field with whom he is acquainted. . . .
>
> On appeal, the petitioner discusses his "recipes for tea therapy" but acknowledges that his "new approach has not been adequately appraised."
>
> Without evidence that the petitioner is pursuing medical research in scientifically sound trials in an area widely accepted as promising, we cannot conclude that the petitioner works in an area of substantial intrinsic merit.

The petitioner, on motion, does not address the above finding. The AAO, therefore, considers this issue to be abandoned. *Sepulveda v. U.S. Att'y Gen.*, 401 F.3d 1226, 1228 n. 2 (11th Cir. 2005), citing *United States v. Cunningham*, 161 F.3d 1343, 1344 (11th Cir. 1998); *see also Hristov v. Roark*, No. 09–CV–27312011, 2011 WL 4711885 at *1, *9 (E.D.N.Y. Sept. 30, 2011) (plaintiff's claims were abandoned as he failed to raise them on appeal to the AAO).

The petitioner's national interest claims on motion focus on the second prong of the *NYSDOT* test, specifically national scope. The petitioner states:

> The benefit of acupuncture in terms of medical science has been widely acknowledged by the medical doctors and scientist [*sic*]. Even if the AAO required the Petitioner's own acupuncture must turn out to be beneficial or at least promising [*sic*]. This reasoning is erroneous, however. The general acupuncture has certain level of positive effect on diseases, using *general* acupuncture. [Emphasis added].[1] Acupuncture has [a] positive result on insomnia according to the *Journal of Advanced Nursing*. Abstract of *Effects of Acupuncture Therapy on Insomnia* is attached herewith as EXHIBIT C. Moreover, acupuncture demonstrated positive effects on the treatment of the headache according to *Science Direct*. *See* EXHIBIT C.
>
> . . . The positive effects of acupuncture [are] actually beneficial and would be national in scope.

Exhibit C includes copies of articles discussing the effectiveness of acupuncture on pain treatment. The petitioner did not establish the effectiveness of acupuncture for the uses he has personally claimed, such as diagnosing digestive disorders based on the "response of the ear to acupuncture." The petitioner has also failed to document other claims, such as the assertion that qigong breathing exercises enable a practitioner to survive "25 minutes" "in a big boiler at [a] vapor temperature of 250 Centigrade" (482° F). Peer-reviewed publications showing that acupuncture is effective on neck pain does not compel the inference that the petitioner's other claims are equally well supported.

[1] The "[Emphasis added]" comment, including brackets, appears in the petitioner's statement on motion.

More relevant to the issue of national scope, the petitioner does not explain how the work of one acupuncturist or "physician of rehabilitative medicine" has national scope. The assertion that acupuncture is in use nationally does not show that the clinical practice of one acupuncturist has a national scope. The direct impact of patient treatment is limited to the patients themselves, and the petitioner has not shown how his practice could treat sufficient numbers of patients to be significant on a national scale.

Following the discussion of the first two prongs of the *NYSDOT* national interest test (intrinsic merit and national scope), the AAO found that the petitioner had not satisfied the third prong by showing that "the petitioner has a track record of success with some degree of influence in the field as a whole." On motion, the petitioner does not address this finding. Therefore, as already explained, the petitioner has effectively abandoned this issue.

The *NYSDOT* national interest test has three prongs, and the petitioner defends only one of them on motion. The petitioner has not shown that the AAO's decision was incorrect at the time of the decision.

Because the petitioner has not shown that the AAO's decision was incorrect at the time of the decision, the petitioner's filing does not meet the requirements of a motion to reconsider. The AAO must therefore dismiss the motion as required by the regulation at 8 C.F.R. § 103.5(a)(4).

ORDER: The motion is dismissed. The AAO's decision of December 1, 2010 is undisturbed.